NO. 83-6456

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LARRY JOE JOHNSON, SR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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(MEMBER OF THE BAR OF THIS COURT)

QUESTIONS PRESENTED

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Johnson v. State,442 So.2d 185 (Fla. 1984), is set forth in Appendix A. The motion for rehearing is set forth in Appendix B, and the denial thereof in Appendix C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered November 17, 1983, and petitioner's timely motion for rehearing was denied on January 16, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1979), which is set forth in Appendix D. This case also involves the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Proceedings

Petitioner was charged by indictment filed in the Circuit Court of Madison County with first degree murder and with robbery while armed with a firearm (R-994, 995). Petitioner was tried by jury and found guilty of both offenses as charged (R-1116, 1117). A penalty phase trial was conducted before the same jury and a recommendation of death was returned (R-1118). The trial judge sentenced petitioner to death for first degree murder and to life imprisonment for the robbery (R-1130, 1136; TR-972). An appeal was taken to the Florida Supreme Court, which affirmed both convictions and sentences, including the death sentence. A timely petition for rehearing was filed and denied on January 16, 1984.

B. Facts

Petitioner was charged with fatally shooting James Maxwell Hadden, a service station operator, in Madison County on March 16, 1979. The direct evidence supporting the state's case came primarily from Patty Burks, a seventeen year old girl who had accompanied petitioner for two weeks on a trip to Florida from Kentucky. She and petitioner traveled to and remained in Orange Park, Florida for two weeks (TR-432).

On March 16, 1979, petitioner and Ms. Burks decided to go to Minnesota where she had relatives, planning to stop in Kentucky on the way (TR-432). As they drove west on Interstate 10 petitioner said he wanted some cigarettes and he stopped at a service station in Lee, Florida. After Ms. Burks was sent inside to buy the cigarettes petitioner entered carrying a sawed off .12 gauge shotgun (TR-435). The attendant, Mr. Hadden, tried to walk out but petitioner told him to open the cash register (TR-435, 436). At petitioner's direction Ms. Burks removed the money and started out the door (TR-436). As she looked back she saw petitioner shoot Mr. Hadden (TR-436). In the car afterward petitioner said the man had a gun and "it was us or him" (TR-476). He also told Ms. Burks "dead witnesses don't talk" (TR-439). One hundred thirty five dollars plus change was taken from the station (TR-439). Petitioner was arrested in Kentucky after Ms. Burks reported the shooting to her mother.

At trial, incriminating statements made by petitioner, a latent fingerprint from inside the service station (TR-655, 656) and other physical evidence were produced to corroborate Ms. Burks' testimony (TR-684, 510, 666, 667, 523, 524, 668, 669, 677, 633, 629-630, 415, 416, 417).

Petitioner did not testify or otherwise present evidence at the guilt phase and was found guilty of both murder and robbery.

In the penalty phase the state relied on (a) the evidence presented to prove guilt, (b) a stipulation that petitioner was

on parole from Kentucky when Mr. Hadden was killed (TR-778), (c) a judgment and sentence against petitioner for second degree assault, the offense for which he was on parole (TR-778), and (d) "rebuttal" testimony from two court appointed psychiatrists, Doctors George W. Barnard and Frank Carrera who together had examined petitioner before trial and who concluded that on March 16, 1979, he knew the difference between right and wrong and was aware of the nature and consequences of his acts (TR-779-787, 794-802). Neither doctor was able to find any "direct" causal relationship between petitioner's experiences while in Vietnam, or a subsequent head injury, and the killing of James Hadden (TR-787, 801, 802).

In the penalty phase petitioner presented testimony of family members, service acquaintances, two psychologists and documentary evidence including reports of army psychiatrists.

Petitioner had lived with his grandmother, who raised him, in the small town of Livermoore, Kentucky (TR-811). When he was five or six petitioner's mother (whom he never knew [TR-889]) was killed in a car accident; his father died of tuberculosis several years later (TR-812). As a school boy petitioner was normal. When he was sixteen petitioner dropped out of school and joined the National Guard (TR-809, 813). Following basic training petitioner soon was on active duty when his National Guard unit was mobilized (TR-813). Petitioner was released after about a year (TR-814). In 1967 or 1968 he joined the Navy (TR-815), was sent to Vietnam, returned, and was sent back for a second tour (TR-816).

After petitioner's release from the Navy, he and his second wife returned to Kentucky (TR-816, 817). This time petitioner was different. Petitioner's "personality changed. He was despondent at times, quick tempered" (TR-816); his aunt "could see a big difference" in that "he was not as tenderhearted as he used to be" (TR-891).

Petitioner rejoined the Livermoore National Guard (TR-817) and soon was considered one of the group and well-liked by the

men in the company (TR-831). On manuevers in September 1974 a smoke grenade hit petitioner on the head and he was evacuated to a hospital and never attended drills again (TR-833, 834).

After being injured petitioner was given emergency treatment at a civilian hospital. He was transferred to the Fort Campbell Army Hospital where he received out patient care for several months (TR-842) and later was hospitalized in a psychiatric ward for "weeks or months" as a result of the injury (TR-843). The army eventually discharged him because of the medical disability resulting from the smoke grenade injury (TR-843, 844).

The head injury caused petitioner to complain of "headaches and dizziness", he started "passing out" and was "a little harder to get along with" (TR-818). Petitioner was having nightmares in which he would "wake up screaming" (TR-818). An ambulance driver described an episode when petitioner was unexplainedly unconscious for several hours. Petitioner's behavior was characterized as despondent and short-tempered (TR-821); he became irritated with his children because of "those bad headaches" (TR-897). After the brother of petitioner's wife "jumped on him one night in his home" petitioner began openly carrying a gun strapped around his belt "like a cowboy" (TR-821, 893). He impersonated a police officer (TR-894).[1]

Relatives believed petitioner was mentally ill and needed help (TR-821, 895). Petitioner sought psychiatric treatment. Through one of the local judges petitioner's sister had him committed to a hospital in Murfreesboro, Tennessee, for two or three weeks (TR-822, 895).

After being arrested for the Hadden murder petitioner had been given a psychological evaluation by clinical neuro-psychologist Dr. Elizabeth McMahon. She interviewed petitioner,

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1. Whether by accident or otherwise petitioner shot his second wife. For this offense he was indicted and ultimately convicted of a lesser offense. This apparently was his only criminal offense.

reviewed his medical records, and administered a series of tests which measured intelligence, neurological function and personality (TR-900-908). These tests showed that petitioner (a) was below average intelligence with an I.Q. in the 70's (TR-901); (b) had brain damage, described as generalized bilateral cortical disfunction (TR-904); and (c) was an anxious, emotionally immature individual who tended to lose control under stress (TR-907, 908).

Through the combination of low mental ability, cognative deficiencies and lack of personality development the petitioner was under extreme mental or emotional disturbance, extreme duress and "beyond any choice to conform his behavior to the requirements of law" at the time he pulled the trigger (TR-912-914).

Petitioner was examined by another psychologist, Dr. Charles R. Figley, a nationally renown authority on post-traumatic stress among Vietnam veterans (TR-850-855). Dr. Figley concluded that petitioner had been exposed to several "life-threatening situations over there and that subsequent to that time, he did re-experience those life-threatening experiences following military service" (TR-858, 859). The stress petitioner had undergone in Vietnam was "[s]ignificant in that it would have a long-lasting effect." It would affect his behavior "after he came back" and "years later" (TR-860).

Until hit by the smoke cannister petitioner had begun to forget the details of the Vietnam trauma; that injury "brought back the fact that the war was still with him, there was a potential of him being killed" (TR-866). This led to appellant's "use of weapons as a desperate attempt to control the amount of threat to him" (TR-867).

Dr. Figley had reviewed the statements of the witnesses and discussed with petitioner the details of the offense. Petitioner told him that after he and Ms. Burks held up the station attendant "she was leaving and he claims that he was under threat. He thought the guy was reaching for a gun and

immediately shot him" (TR-868). At that time petitioner was under the influence of "extreme mental disturbance" (TR-868) and was "definitely impaired".

The jury's subsequent recommendation of death as the proper sentence (R-1118) was followed by the trial judge who found several aggravating circumstances (TR-1130, 1136).

The court rejected all evidence which appellant had offer at the penalty phase by finding no mitigating circumstances (R-1136).

In explaining his decision to impose death the court said:

> The aggravating circumstances warrant the imposition of the death sentence and there are no mitigating circumstances to outweigh the aggravating circumstances.
>
> (R-1136)

The Florida Supreme Court affirmed petitioner's death sentence in an opinion reported at 442 So.2d 185.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On appeal, petitioner contended that the trial judge erred by not finding mitigating circumstances (pp. 37-44 of petitioner's brief). This argument was that the trial judge acted arbitrarily and irrationally by disregarding completely the mitigating evidence that the homicide occurred while petitioner was under the influence of extreme mental or emotional disturbance; that petitioner acted under extreme duress; and that the capacity of petitioner to conform his conduct to the requirements of law was substantially impaired, which are three separate statutory mitigating circumstances, sections 921.141(6)(b), (e), and (f), Fla. Stat. 1979, respectively. Petitioner also contended that the trial judge erroneously appeared to bind himself to the statutory mitigating circumstances and had failed to consider non-statutory mitigating circumstances, primarily petitioner's military record. This was claimed to be a constitutional defect because under the Eighth and Fourteenth Amendments as construed in Lockett v. Ohio, 438 U.S. 586 (1978)

presentation of relevant mitigating circumstances may not be restricted and consequently they could not arbitrarily be ignored by the sentencing authority.

On appeal the Florida Supreme Court rejected the contention that petitioner's mental and emotional state were mitigating circumstances saying:

> It was within the trial judge's province to grant the two psychologists' testimony little or no weight. Lucas v. State, 376 So.2d 1149 (Fla. 1979). We therefore find that the trial judge did not err in rejecting [petitioner's] contention that these mitigating circumstances applied. 442 So.2d at 189.

The court did not comment directly on the evidence of other mitigating circumstances.

Petitioner also contended that the Eighth and Fourteenth Amendments were violated by the trial judge when he stated in the sentencing order that he considered his own "observations" of petitioner during the trial as negating mitigating circumstances supported by evidence.

Commenting on this "finding", which did not elucidate on what the court's "observations" or petitioner's behavior were, the Florida Supreme Court said:

> Although justice should be blind, judges are not. They may properly notice a defendant's behavior and draw inferences concerning matters such as whether the defendant is capable of appreciating the criminality of his conduct. It would help if a judge who relies on his personal observations would describe them in detail in order to give a reviewing court a basis for deciding whether his conclusions are correct. (Emphasis added) 442 So.2d at 190.

REASONS FOR GRANTING WRIT

QUESTION PRESENTED

WHETHER, AS APPLIED TO PETITIONER, THE FLORIDA SUPREME COURT'S INTERPRETATION OF THE STATE'S DEATH PENALTY STATUTE THAT A TRIAL JUDGE'S FINDING OF NO MITIGATION WILL BE REVERSED ONLY FOR A PALPABLE ABUSE OF DISCRETION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner knows this Court does not review errors in weighing evidence made by Florida courts. Review should be granted, however, in this case to establish a constitutional principle that a trial court imposing, and an appellate court reviewing, a death sentence must give some weight to mitigating circumstances which have unquestionably been established. The arbitrary and unreasonable failure to acknowledge the existence of mitigating circumstances is a constitutional error which follows as a natural consequence of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

In Lockett this Court held that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense which are proffered as a basis for a sentence less than death. Lockett, supra, 438 U.S. at 604. Later, in Eddings, this Court held that it was error for the trial judge and the reviewing court on appeal to fail to consider the proffered mitigating evidence. Both the trial and appellate courts in Eddings had apparently believed that the mitigating circumstances could not properly be considered as offsetting the aggravating circumstances. This Court said:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the court of criminal appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence

from their consideration. (Emphasis in original)

Id., at 113, 114

The progression from Lockett to Eddings requires a third step for a complete fulfillment of Eighth and Fourtheenth Amendment objectives. Just at the state cannot prevent the introduction of mitigating evidence and the sentencer not wrongfully consider it irrelevant because of state law considerations, it is now necessary for this Court to require that mitigating evidence in the record not be disregarded arbitrarily or for an insufficient reason or for no reason at all.

The petitioner presented overwhelming evidence of mitigating circumstances. His history of mental illness beginning with release from the military service was uncontradicted. The two psychologists who examined him for evidence of statutory mitigating circumstances found that petitioner's mental condition was a contributing circumstance in the homicide. The state's evidence did not directly contradict the evidence of the enumerated mitigating circumstances. The state's psychiatrists, who examined petitioner to determine legal at the time of the offense, did not even mention in their testimony extreme mental or emotional disturbance, extreme duress, or capacity to conform to requirements of law.

In contrast, for petitioner Dr. McMahon testified that all three of these mitigating circumstances, described by §§ 921.141(6)(b),(e) and (f), were present. Dr. Figley found petitioner to have been under the influence of extreme mental disturbance [§ 921.141(6)(b)] and to have been impaired in appreciating the criminality of his conduct or conforming his conduct to law [§ 921.141(6)(f)].

Doctor Figley, moreover, articulated the reasons for the difference between his (and Dr. McMahon's) findings compared with those of pyschiatrists Bernard and Carrera stating they had not gone "as far as we did in terms of what they did".

The trial judge found no "credible evidence" of extreme mental emotional disturbance [(6)(b)] or extreme duress [(6)

(e)] and disregarded the "conflicting" testimony which favored petitioner on impaired capacity [(6)(f)]. Not even mentioned was the lay testimony corroborating petitioner's post-Vietnam illnesses.

In addition to not finding some statutory mental or emotional mitigation, the trial judge seemed oblivious to non-statutory mitigation, which included petitioner's record of military service. The sentencing order discloses the lack of concern for mitigation beyond those in the statute, stating:

> [w]hen considered in the light of statutory circumstances with respect to both aggravation and mitigation, this Court feels that this [death] sentence is clearly warranted.

From all indications, neither the trial judge nor the Florida Supreme Court considered petitioner's military service in any way as a mitigating circumstance even though it was a significant part of his character.

The standard of appellate review of mitigating circumstances in Florida leads to, if not encourages, the application of arbitrary and unreasonable discretion in the imposition of capital punishment. The Florida Supreme Court has agreed with the proposition that "it lies within the province of the trier of fact to weigh the evidence. . . ." of mitigation Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979). Recently in Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984) that Court said:

> So long as all the [mitigating] evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.

In Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982) the Court set the standard as being "within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it." (Emphasis added)

These pronouncements, and their application, do little to protect against the arbitrary infliction of capital punishment. Florida's death penalty statute,[1] approved in Proffitt

1. Section 921.141, Fla. Stat. (Supp. 1976-77)

v. Florida, 428 U.S. 242 (1976) requires a comparison of aggravating and mitigating circumstances. Upholding the statute as written, this Court said:

> [T]o the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." [Citations omitted] (Emphasis added)
>
> 428 U.S. at 253.

Obviously the Florida Supreme Court has not upheld its obligation to reweigh the evidence of mitigating circumstances. This function, instead, has been abdicated to trial judges under the amorphorous rubric of "palpable abuse of discretion" Pope, supra.

The evidence, the sentencing order, and the opinion on appellate review expose a serious constitutional flaw in the application of mitigating circumstances under Florida's death penalty statute.[2]

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2. Several members of this Court noted the improper failure of the Florida Supreme Court to require recognition of a mitigating circumstance. In Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1983) Justice O'Connor, in dissent joined by the Chief Justice and Justices Powell and Rehnquist said:

> Although the state statutory procedures did not prevent the trial judge from considering any mitigating circumstances, the trial judge's view of the facts, in part rejected by the state's supreme court, effectively prevented such consideration. In his erroneous belief that the petitioner had shot both of the victims while they lay in a prong position in order to eliminate them as witnesses, the trial judge necessarily rejected the only argument offered in mitigation - that the petitioner's role in the capital felonies was minor, underserving of the death penalty, because the petitioner was in the car when the fatal shots were fired. This fundamental misunderstanding of the petitioner's role in the crimes prevented the trial court from considering the "circumstances of the particular offense" in imposing sentence. (Footnote omitted)
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> 73 L.Ed.2d at 1172-73.

The same dissenting opinion mentions in a footnote to that passage that the Florida Supreme Court's opinion failed to correct this error either by remanding for new sentencing or by evaluating the impact of the trial court's misperception of the petitioner's role in the killings. The court's opinion, stating merely that there were no mitigating circumstances was "inadequate to satisfy the Lockett principle" 73 L.Ed.2d at 1173 n. 46.

If, as exemplified here, sentencing judges and reviewing courts can at whim fail to take into consideration evidence that would mitigate the offense the result will be a return to the procedures that existed before Furman v. Georgia, 408 U.S. 238 (1972) in which the death penalty was administered so arbitrarily that it was virtually impossible to distinguish rationally the cases in which it was imposed from those in which it was not.

Accentuating the arbitrary rejection of mitigating evidence here, the trial judge justified his conclusions in part by relying on unexplained "observations" he made of petitioner during trial. This error is so significant it is asserted as an independent ground for granting the writ (see pp. 13-16, infra). By allowing unspecified "observations" to overcome evidence, the Florida Supreme Court has compounded the systemic flaw it created in granting trial judges virtually unreviewable discretion to disregard mitigation. This case further extends the invitation to act arbitrarily. If courts can ignore mitigating circumstances without lawful justification there will not be a reasoned application of the death penalty statute. Only by requiring mitigating circumstances to be acknowledged and then balanced against aggravation will the full statutory scheme be preserved.

Petitioner's case servs as a model of how an irrational failure to find mitigating circumstances can distort the capital sentencing process. The trial and appellate courts should have recognized the mitigating circumstances and balanced them against those in aggravation and made a proper comparison. See, Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134 (1983).

Florida allows arbitrary rejection of mitigating evidence, possibly because an adequate constitutional standard has not yet been set. Even though Lockett and Eddings permit presentation, and require consideration, of mitigating circumstances, protection from arbitrariness is insufficient as long as the sentencing authority retains virtually unreviewable discretion to reject mitigation. An opportunity to address and correct that important deficiency is presented here.

QUESTION PRESENTED

APPELLATE REVIEW OF PETITIONER'S DEATH SENTENCE COULD NOT HAVE BEEN CONDUCTED IN CONFORMITY WITH THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN UNEXPLAINED "OBSERVATIONS" OF PETITIONER DURING TRIAL WERE MADE BY THE TRIAL JUDGE AND USED TO REBUT MITIGATING EVIDENCE.

Petitioner presented substantial evidence of mitigation. It was all obliterated by some unknown quality detected, but not explained, by the trial judge who said:

> Taken as a whole together with the court's own observations of the Defendant during the trial, as well as his testimony in pretrial proceedings, this Court concludes that there were no mental or psychological factors sufficiently significant to support a conclusion as to any mitigating circumstances. (Emphasis added) (TR-1135)

Petitioner did not testify in either the guilt or penalty phase. It is not evident what "observations" were made by the judge or when, or how they supported his conclusions that there were no mitigating circumstances.[3] The Judge's order does not specify what petitioner said or did during the pretrial or trial proceedings that would override evidence of mitigating circumstances.

On appeal the Florida Supreme Court found no impropriety in the trial judge's reliance on "a defendant's behavior" in the courtroom for drawing "inferences concerning matters such as whether the defendant is capable of appreciating the criminality of his conduct." 442 So.2d at 190.

Even though it would have helped for the judge to describe "in detail" the personal observations, the trial judge's other reasons in support of his conclusions enabled the Florida Supreme Court to "find no error".

Use of unarticulated "observations", without warning to the accused and without an opportunity for rebuttal or explanation, violates fundamental due process.

The practice endorsed here allowed some vague and

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3. Petitioner's testimony before the trial on the motion to suppress, based upon Fourth Amendment grounds, could not have been used against him at trial, Simmons v. United States, 390 U.S. 337 (1968), yet the trial judge considered this testimony, or the way it was delivered, as evidence rebutting mitigating circumstances.

subjective criteria to influence the decision without notice to petitioner. Apparently the trial judge was making reference to petitioner's appearance, demeanor or a similar superficial characteristic. Paraphrased he might have been saying he rejected mitigation because "he just didn't like appellant's looks" or because the petitioner appeared to be free of mental or emotional disturbance at the trial.

Neither petitioner not any reviewing court can with assurance know what the judge meant.[4]

When the trial judge used his "observations" of petitioner as support for the death sentence he violated the precepts of Gardner v. Florida, 430 U.S. 349 (1977) by considering information not disclosed to petitioner and his counsel. When deciding whether to impose death a trial judge is bound by the special standards of reliability imposed by the Eighth and Fourteenth Amendments. Gardner v. Florida, supra; Lockett v. Ohio, 438 U.S. 586 (1978). A defendant must be given the opportunity to deny or explain adverse information relied upon in the sentencing process. By the trial judge's use of his "own observations" petitioner was deprived of the required chance to challenge the accuracy or reasonableness of the impressions formed by the judge.

Allowing subjective and unarticulated observations to void evidence of mitigation is rife with opportunities for unreviewable discretion to invade the sentencing process.

In State v. Dixon, 283 So.2d 1 (Fla. 1973) the Florida Supreme Court said written findings must accompany a death sentence so that on review it could be determined that the "reasons" justifying death sentences were the same throughout the state. When, as here, a trial judge makes an important

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4. Parenthetically, there was a suggestion that appellant was taking medication during the trial (TR-645) thereby making it possible that appellant's appearance was altered by drugs. With no explanation of what was observed, the trial judge's order does not eliminate the unfair possibility of a medicated state being used to justify a death sentence.

choice of rejecting mitigating circumstances supported by ample evidence because of undisclosed "observations" the petitioner and the appellate court cannot know what the observations were and how they support the conclusions reached.

If these unknown and therefore unreviewable conclusions are allowed to cancel record evidence of mitigating circumstances the reasoned judgment theory of capital punishment will be defeated. This point was explained in Gregg v. Georgia, 428 U.S. 153, 195 (1976) when this Court said:

> Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to insure that death sentences are not imposed capriciously or in a freakish manner.

The importance of appellate review in Florida's capital sentencing process was noted in Proffitt v. Florida, 428 U.S. 242, 253 (1976) as a justification for finding the statute constitutional. Further, this Court found:

> If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons and the evidence supporting them, are conscientiously reviewed by a court . . . (Emphasis added) 428 US at 259

In Woodson v. North Carolina, 428 U.S. 280, 303 (1976) the Court said a mandatory death penalty statute failed to "fulfill Furman's basic requirement by replacing arbitrary and wanton . . . discretion with objective standards to guide, regularize and make rationally reviewable" the death sentencing process.

What the trial judge said in his order here revives the practice of arbitrary and capricious infliction of the death penalty forbidden by Furman v. Georgia, 408 U.S. 238 (1972). The reasons here are too vaguely stated to permit the kind of appellate review envisioned in Proffitt and required in Gardner, supra, when this Court said:

> Since the State must administer its capital-sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S., at 250, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full

> disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia. (Emphasis added) 430 U.S. at 361

Obviously the trial judge's crucial "observations" are not to be found in the record on appeal. Appellate review, necessary to the constitutional application of § 921.141, could not have been performed because important elements relied on by the trial judge are missing from the record.

This Court should grant review to prevent repetition of the arbitrary sentencing practice employed here, the effect of which is a complete denunciation of the principle pointedly applied to Florida in Gardner.

CONCLUSION

The sentencing order and the affirming opinion on appeal are powerful documentation of the arbitrary practices prevailing under the Florida death penalty statute. This Court should issue a writ of certiorari to correct these ongoing Eighth and Fourteenth Amendment violations.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida has been furnished by U.S. mail to the Honorable Michael Rodak, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Larry Joe Johnson, Sr., #071643, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to Honorable Sid White, Clerk of the Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, on this 9th day of March, 1984.

MICHAEL J. MINERVA

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LARRY JOE JOHNSON, SR.,

Petitioner,

vs.

STATE OF FLORIDA,

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APPENDIX

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Larry Joe JOHNSON, Appellant,

- v.

STATE of Florida, Appellee.

No. 58713.

Supreme Court of Florida.

Nov. 17, 1983.

Rehearing Denied Jan. 16, 1984.

Defendant was convicted in the Circuit Court, Madison County, L. Arthur Lawrence, Jr., J., of first-degree murder and armed robbery, and he appealed. The Supreme Court held that: (1) defendant failed to show that he had been prejudiced by fact that bailiff helped select the jury; (2) prosecutor's comment in closing argument referring to victim's family was not so prejudicial as to have influenced jury to render a more severe recommendation than it would have otherwise and was therefore not reversible error; and (3) trial court did not err in not finding defendant's emotional and mental state to be a mitigating circumstance in sentencing defendant to death.

Affirmed.

Ehrlich, J., concurred specially with an opinion.

McDonald, J., concurred in part and dissented in part and filed opinion, in which Overton, J., joined.

1. Criminal Law ⇐1166.16
Jury ⇐66(2)

It is not good practice for bailiff to help select jury, but such practice is not so inherently prejudicial as to require reversal of conviction; rather, prejudice must be proven.

2. Criminal Law ⇐1166.16

Defendant failed to show how he had been prejudiced by fact that county sheriff, who had participated in investigation of crimes and assisted counsel in selection of jury, acted as bailiff during trial, where record showed that it was not unusual for sheriff to assist State Attorney in selecting jury, sheriff testified that whispered conversations he had with State Attorney were outside prospective jurors' hearing, and sheriff said that he had not and would not discuss case with any members of jury, and thus defendant was not denied his due process right to be tried by an impartial jury. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐1037.1(1)

Two occasions on which prosecutor allegedly made improper comments during closing arguments of penalty phase of trial would not be considered since defendant failed to object.

4. Criminal Law ⇐723(1)

During closing arguments a prosecuting attorney should not attempt to elicit jury's sympathy by referring to victim's family.

5. Criminal Law ⇐1171.1(6)

Although single comment by prosecutor referring to victim's family, made at sentencing portion of trial in response to testimony of defendant's relatives in his behalf was improper, comment was not so prejudicial as to have influenced jury to render a more severe recommendation than it would have otherwise and was therefore not reversible error.

6. Homicide ⇐354

Testimony regarding defendant's admission that he killed proprietor of store because "dead witnesses don't talk" was sufficient proof that defendant committed murder to eliminate a witness to robbery and supported trial court's finding in aggravation that murder was committed for purpose of avoiding arrest or hindering law enforcement, despite defendant's contention that testimony was not credible because witness was only 17 and a participant in crime.

7. Criminal Law ⇐1208.1(5)

Defendant's previous conviction of assault for shooting his wife constituted significant history of prior criminal activity precluding finding as a mitigating circumstance that defendant, who was sentenced

to death for murder and armed robbery, had no significant history of prior criminal activity, even though this was his only prior conviction, where offense was serious.

8. Criminal Law ⇐986.2(4)

In determining what is significant criminal activity, for purposes of finding mitigating circumstance, trial court may consider severity as well as number of prior offenses.

9. Criminal Law ⇐1208.1(5)

Trial court did not err in not finding defendant's emotional and mental state to be a mitigating circumstance in sentencing defendant convicted of murder and armed robbery to death, despite testimony of two psychologists.

10. Criminal Law ⇐1208.1(6)

In finding that mitigating circumstances did not apply, trial court in sentencing defendant convicted of murder and armed robbery to death did not err in taking into account its own observations of defendant during trial, as well as his testimony in pretrial proceedings, particularly where trial court gave sufficient reasons to support its conclusions independent of personal observations.

11. Criminal Law ⇐995(4)

Since defendant committed homicide for purpose of eliminating a witness, there was sufficient proof of premeditation, and thus armed robbery was not a lesser included offense and defendant was not entitled to be separately sentenced on that crime.

Milo I. Thomas, Jr., Public Defender, Third Judicial Circuit, Lake City, and Michael J. Minerva and Clifford L. Davis, Sp. Asst. Public Defenders, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Gregory C. Smith, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction of a capital felony for which a sentence of death was imposed. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Larry Joe Johnson was convicted of first-degree murder and armed robbery. At the trial Patty Burks testified that on March 16, 1979, she and Johnson stopped at a service station along Interstate Highway 10 in Madison County. She said that Johnson aimed a sawed-off shotgun at the proprietor while she took money from the cash register. She testified that after she left the building, Johnson shot the proprietor. They drove on to Kentucky where Burks, through her mother, informed the police of the murder. The police arrested Johnson for violating probation and later turned him over to Florida authorities. Found in his car were a sawed-off shotgun and number five shot shells, the same type of shot found in the victim's body.

In accordance with the jury's recommendation, the trial judge imposed a sentence of death for the offense of first-degree murder. Johnson was sentenced to life imprisonment for the offense of armed robbery. In this appeal, Johnson argues that the sheriff should not have been allowed to act as bailiff, that the prosecutor's closing arguments were improper and prejudicial, and that his sentences were improperly imposed. Since we find no reversible error was committed, we affirm.

Johnson's first argument on appeal is that he was denied his fourteenth amendment due process right to be tried by an impartial jury. This argument is based on the assertion that the county sheriff, who had participated in the investigation of the crimes and assisted counsel in the selection of the jury, acted as bailiff during the trial. Johnson points out that in *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), the United States Supreme Court held that it was a violation of due process to allow two deputies who were material witnesses for the state to act

as custodians of the jury even though there was no proof of improper communication between them and the jury. The Court concluded that since the credibility of the witnesses was a deciding factor in the case, the procedure was improper and prejudice was inherent in the continual association of the witnesses with the jury. Johnson argues by analogy that prejudice is also inherent in the present situation where the sheriff helped the prosecution select the jury and then acted as bailiff.

Long before *Turner* was decided this Court held that prejudice would be presumed where a material witness for the prosecution was allowed to act as bailiff. *See Owens v. State*, 68 Fla. 154, 67 So. 39 (1914). However, the Court has never extended this holding to cases where the bailiff's testimony was not material to the case. *See Rhone v. State*, 93 So.2d 80 (Fla.1957); *Moseley v. State*, 60 So.2d 167 (Fla.1952). Thus we are not aligned with those jurisdictions that hold that the mere association of the bailiff with the prosecution is sufficient cause to reverse a conviction. *See* 4 C. Torcia, *Wharton's Criminal Procedure* § 563 (12th ed. 1976); Annot., 38 A.L.R.3d 1012 (1971).

Different considerations apply when the bailiff has helped in the investigation and in the selection of the jury than apply when the bailiff is a material witness. In *Turner* the Supreme Court emphasized that the credibility of the witnesses was enhanced by their continued association with the sequestered jurors during the trial. Because of the witnesses' continual and close association with the jury, the Court found that their credibility in the eyes of the jury was affected by factors taking place outside of the courtroom. In this case the sheriff did not testify so his credibility was not an issue. Therefore we are not faced with the issue of whether the jury may have been influenced by extraneous factors in assessing the credibility of a witness.

In *Smith v. State*, 251 Miss. 241, 169 So.2d 451 (1964), while the jury was being empanelled and tendered to the state, the district attorney motioned for the sheriff and his deputies to retire with him to pass upon the jury. This was done in the presence of the jury. Over the defendant's objections, the trial court later appointed two of the deputies as bailiffs. The Mississippi Supreme Court reversed the conviction on the ground that an appearance of impropriety might weaken the public's confidence in the judiciary.

[1] We agree with the basic tenet in *Smith* that it is not good practice for the bailiff to help select the jury. However, we disagree with the conclusion that such a practice is so inherently prejudicial as to require reversal of a conviction. Unlike the situation where the bailiff testifies and his credibility is affected by his close and continual association with the jury, for the bailiff to assist in the selection of the jury does not necessarily have a direct bearing on any issue to be determined by the jury. Therefore prejudice cannot be inferred but must rather be proven.

[2] Johnson has failed to show how he has been prejudiced in this case. The record shows that it is not unusual for the sheriff to assist the state attorney in selecting a jury. Because of the small size of Madison County, the sheriff's staff is not very large so the sheriff himself often acts as the bailiff. He is not allowed to do so when he is a witness. The sheriff testified that during voir dire he did carry on whispered conversations with the state attorney. He said these conversations took place about fifteen feet behind and to the right of the jury box and were outside of the prospective jurors' hearing. He said that he had not and would not discuss the case with any members of the jury. The court found no improprieties had been committed. We therefore find that Johnson was not denied his right of due process under the fourteenth amendment to be tried by an impartial jury.

[3] Appellant argues that on three separate occasions during the closing arguments of the penalty phase of the trial, the prosecutor made improper comments. We will not consider two of those occasions

since appellant failed to object. *Clark v. State*, 363 So.2d 331 (Fla.1978). As for the third occasion, the prosecutor argued as follows:

> You have heard some evidence presented by the defense here designed to tug at your heart strings, to show you that the defendant was a living, breathing, human being with feelings possessed by an ordinary person. You have become acquainted with his family here today. Another family, perhaps you haven't become closely associated with, that is the [victim's] family, will be facing this holiday season one short.

Defense counsel immediately objected and requested a bench conference. At the bench defense counsel requested that the jury be instructed to disregard the comment and moved for a mistrial. The trial court sustained the objection but denied the motion for mistrial. The trial court also found that it would be inappropriate to say anything further to the jury since the comment was not prejudicial.

[4, 5] Appellant is correct in contending that during closing arguments a prosecuting attorney should not attempt to elicit the jury's sympathy by referring to the victim's family. *Grant v. State*, 171 So.2d 361 (Fla.1965), *cert. denied*, 384 U.S. 1014, 86 S.Ct. 1933, 16 L.Ed.2d 1035 (1966); *Puit v. State*, 112 So.2d 380 (Fla.1959). Although this Court reversed the defendants' convictions in the two cited cases, the same result is not required in this case. In both cases the references to the families of the victims were but small parts of closing arguments the whole tenor of which were improperly emotional and prejudicial. In this case, there was a single comment made at the sentencing portion of the trial in response to the testimony of the defendant's relatives in his behalf. Although improper, the comment was not so prejudicial as to have influenced the jury to render a more severe recommendation than it would have otherwise and is therefore not reversible error. *See Darden v. State*, 329 So.2d 287 (Fla.1976), *cert. dismissed*, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

After the penalty phase of the trial, the jury recommended the death penalty. The trial judge adopted this recommendation, finding three aggravating circumstances: that appellant had previously been convicted of a felony involving violence and was under sentence of imprisonment; that the murder was committed during the commission of a felony and for pecuniary gain; and that the murder was committed to avoid arrest and to hinder law enforcement. The judge found no mitigating circumstances.

Appellant first challenges the imposition of the death sentence by asserting that the jury was improperly influenced by various reasons, some of which we have already discussed. Since none of the reasons mentioned establish any improper prejudice, we find that the jury was not improperly influenced in reaching its recommendation.

[6] Next appellant argues that the court erred in finding as an aggravating circumstance that the murder was committed to avoid arrest and to hinder law enforcement. This finding was based on the testimony of Patty Burks who said that appellant explained he killed the proprietor because "dead witnesses don't talk." Appellant argues that Ms. Burks' testimony was not credible because she was only seventeen and a participant in the crime. The credibility of a witness is for the finder of fact, not an appellate court, to determine. The testimony to appellant's admission is sufficient proof that he committed the murder to eliminate a witness to the robbery. This evidence supports the trial judge's finding that the murder was committed for the purpose of avoiding arrest or hindering law enforcement. *Knight v. State*, 338 So.2d 201 (Fla.1976); *Meeks v. State*, 339 So.2d 186 (Fla.1976), *cert. denied*, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978).

[7, 8] Appellant also contends that the court erred in not finding as a mitigating circumstance that appellant had no significant history of prior criminal activity. The judge refused to find this as a mitigating circumstance because appellant had been

previously convicted of assault for shooting his wife. Appellant claims that a single conviction does not constitute a significant history of prior criminal activity. We disagree. In determining what is significant criminal activity, the trial judge may consider the severity as well as the number of prior offenses. *See State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). We have upheld holdings that this mitigating circumstance does not apply when a defendant has been previously convicted of a single serious offense such as murder, *Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981), or breaking and entering; *Proffitt v. State*, 315 So.2d 461 (Fla. 1975), *aff'd*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). We therefore hold that the trial judge was correct in not finding this as a mitigating circumstance.

[9] Appellant also argues that the trial judge erred in not finding his emotional and mental state to be a mitigating circumstance under subsections 921.141(6)(b), (e), and (f), Florida Statutes (1977). With respect to these mitigating circumstances, the trial court found:

> Defendant was able to appreciate the criminality of his conduct and that there is no basis for concluding that the capacity of the Defendant to conform his conduct to the requirements of law was substantially impaired. There was some conflicting testimony on this point. The Defendant was examined by two psychiatrists and two clinical psychologists. All of the evidence from the experts indicated that the Defendant was able to distinguish that which is "right" from that which is "wrong" and that he was legally sane at all material times. However, the testimony from one clinical psychologist, Dr. Charles R. Figley, advanced the theory that the Defendant, at the time he actually pulled the trigger, did so from impulsive behavior which had a direct causal relationship to his experience in Vietnam. This particular witness had written a book consistent with this theory, but readily admitted that he was one of the few people who have done any work in this area. The theory or opinion was to some extent also supported by the testimony of another clinical psychologist, Dr. McMahon. Her opinion suggested that the Defendant suffered from organic brain damage and that he was of border-line intelligence. The testimony of the two clinical psychologists was disputed by the two psychiatrists. Taken as a whole, together with the Court's own observations of the Defendant during the trial, as well as his testimony in pretrial proceedings, this Court concludes that there were no mental or psychological factors sufficiently significant to support a conclusion as to any mitigating circumstance. The evidence clearly showed that the Defendant planned the robbery of the service station, executed the plan, and killed the service station operator because "dead witnesses don't talk." The State introduced into evidence the shotgun with which the Defendant killed the service station operator. The shotgun was owned by the Defendant for a substantial period of time prior to the homicide and was found in his possession two days after the homicide was committed. A visual examination of the shotgun plainly shows that the barrel had been sawed off and the stock had been replaced with a pistol grip. Such a shotgun had only one practical purpose—the use for which it was in fact made. This leads the Court in part to the conclusion that the Defendant fully appreciated the criminality of his conduct and had no intention of conforming his conduct to the requirements of law. It further supports this Court's conclusion that the Defendant was not acting under extreme duress or under the substantial domination of another person.

It was within the trial judge's province to grant the two psychologists' testimony little or no weight. *Lucas v. State*, 376 So.2d 1149 (Fla.1979). We therefore find that the trial judge did not err in rejecting appellant's contention that these mitigating circumstances applied.

[10] Appellant takes issue with the fact that the trial judge in finding that these mitigating circumstances did not apply took into account his "own observations of the Defendant during the trial, as well as his testimony in pretrial proceedings." Appellant argues that the trial court's use of personal observations without warning and without an opportunity for rebuttal violated his fundamental right of due process. Appellant compares this procedure to that of a trial judge's considering a presentence investigation report without the defendant's knowledge, which procedure was disapproved in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The analogy is not appropriate. Whereas a defendant may not know what information is contained in a presentence investigation report he must know how he is behaving in the courtroom. In this situation the judge is not relying on information that is not available to the defendant. Although justice should be blind, judges are not. They may properly notice a defendant's behavior and draw inferences concerning matters such as whether the defendant is capable of appreciating the criminality of his conduct. It would help if a judge who relies on his personal observations would describe them in detail in order to give a reviewing court a basis for deciding whether his conclusions are correct. However, in this case the trial judge gave sufficient reasons to support his conclusions independent of the personal observations, so we find no error.

[11] Finally, appellant argues that he should not have been sentenced separately for the crime of armed robbery on the ground that it was a lesser included offense of felony-murder. *See State v. Hegstrom*, 401 So.2d 1343 (Fla.1981). Since we have already concurred with the court's finding that appellant committed this homicide for the purpose of eliminating a witness, there is sufficient proof of premeditation. Therefore, the armed robbery was not a lesser included offense and *Hegstrom* does not apply.

We conclude there is competent substantial evidence supporting the trial judge's findings with respect to the aggravating circumstances. Apparently in attempt to comply with the reasoning in *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), the trial judge found as a single aggravating circumstance that appellant had previously been convicted of a felony involving violence and was under sentence of imprisonment. This finding was based on the fact that appellant was still under sentence for having committed a second-degree assault in Kentucky. We note that there was no need to treat these separate statutory aggravating circumstances as a single aggravating circumstance because they are "two separate and distinct characteristics of the defendant, not based on the same evidence and the same essential facts." *Waterhouse v. State*, 429 So.2d 301, 307 (Fla.1983). The trial judge did, however, correctly apply *Provence* in finding as a single aggravating circumstance that the murder was committed during the commission of a robbery and was committed for pecuniary gain. The judge also correctly applied the reasoning of *Provence* in finding as a single aggravating circumstance that the murder was committed to avoid or prevent a lawful arrest and was committed to disrupt or hinder the enforcement of the law. *See Francois v. State*, 407 So.2d 885 (Fla.1981), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982).

Having found no reversible error we affirm appellant's convictions for first-degree murder and armed robbery and his respective sentences of death and life imprisonment.

It is so ordered.

ALDERMAN, C.J., and ADKINS and BOYD, JJ., concur.

EHRLICH, J., concurs specially with an opinion.

McDONALD, J., concurs in part and dissents in part with an opinion, in which OVERTON, J., concurs.

EHRLICH, Judge, specially concurring.

I am of the opinion that if the sheriff or one of his deputies participates in the trial by counseling with the prosecutor during the selection of the jury or during the course of the trial, he should not be the bailiff. By assisting the prosecutor, he is identified in the eyes of the jury as a member of the prosecutor's team. The bailiff on the other hand, should have an absolutely neutral role in the trial proceedings. He makes certain that the jury's seclusion is not disturbed except by direction of the Court. He ministers to the jury's needs. He's the one person who can, and of necessity does, communicate with the jury during the course of the trial as the need may arise. The lawyers are prohibited from talking to or otherwise fraternizing with the jury, and the jury is generally advised of this fact so that they will understand why counsel, who may be known to them, are treating them as pariahs. But not so the bailiff. If the jury members have a need, they turn to the bailiff. The role of the neutral bailiff and the role of one who is in effect on the prosecutor's team are mutually exclusive. The roles don't mix.

In the case at hand, the sheriff did counsel with the state attorney within view of the jury. Because of personnel problems, the sheriff acted as the bailiff also. This may not be uncommon in small rural counties. While no improprieties may actually take place, and there is no intimation in this record that any did, this dual role does carry the appearance and the potential of impropriety.

I think that if the state attorney needs the sheriff or his deputy's assistance during the trial, that someone else should serve as bailiff. To do otherwise may very well jeopardize the state's case.

While I disapprove of and recommend against the sheriff's dual role employed in the trial of this case, nonetheless I concur in the judgment of conviction and the sentence and the opinion of the Court because I find no evidence of actual impropriety and no demonstrable harm to the defendant.

McDONALD, Judge, concurring in part and dissenting in part.

Sheriff Peavy acted as investigator of the crime, confidant to the prosecutor when the jury was selected, and then custodian of the jury. These services are incompatible with each other and should not be allowed. A close relationship exists between a bailiff and the jury of which he is in charge. The bailiff looks after the jury's welfare, frequently converses with them, and when sequestered for meals is in attendance with them.

I agree with the majority that this happenstance alone does not *require* a reversal but it alerts this Court that we should unqualifiedly satisfy ourselves that the sheriff's acting as a bailiff affected neither the conviction nor the jury's recommendation on the sentence. The evidence of guilt is overwhelming in this case and I am fully satisfied that even if Sheriff Peavy had inadvertantly communicated with the jury on some of the issues the verdict would be the same. The test of harmless error enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), is clearly present in the guilt phase. Less clear is the sentencing phase and the jury's recommendation of death. While Johnson clearly earned several aggravating circumstances, he also presented some mitigating testimony. A sympathetic jury could logically have recommended life. I do not suggest that the sheriff intentionally subjected the jury to the views of the state, but I would be extremely surprised if the jury felt that it would be displeasing him if it recommended death.

This is a sensitive area. The practice here should not be encouraged. Because of that I vote to grant a new sentencing hearing. I would affirm the conviction.

OVERTON, J., concurs.

AETNA CASUALTY & SURETY CO., Petitioner,

v.

The WACKENHUT CORP., Respondent.

No. 62767.

Supreme Court of Florida.

Nov. 17, 1983.

Rehearing Denied Jan. 16, 1984.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions, Third District—Case No. 81-764.

Mark J. Mintz of Ress, Gomez, Rosenberg & Howland, North Miami, and Sheridan K. Weissenborn of Papy, Poole, Weissenborn and Papy, Coral Gables, for petitioner.

Richard H.W. Maloy, Coral Gables, for respondent.

PER CURIAM.

Approved. 418 So.2d 1013. *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061 (Fla.1983); *Morrison v. Hugger*, 369 So.2d 614 (Fla. 2d DCA 1979).

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, EHRLICH and SHAW, JJ., concur.

McDONALD, J., dissents with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, dissenting.

I dissent. Wackenhut's policy states that Aetna will pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage." This is the same language as in the insurance policy involved in *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061 (Fla.1983), and I am still not able to equate "punitive damages" to "damages because of bodily injury."

The above-quoted language from Wackenhut's policy is a standard provision found in many insurance policies. Numerous courts have considered this language in the context of punitive damages. They generally center on the obligation to pay "all sums" and decide that "all sums" means all sums, including punitive damages. *Southern Farm Bureau Casualty Insurance Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Greenwood Cemetery, Inc. v. Travelers Indemnity Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977); *Scott v. Instant Parking, Inc.*, 105 Ill.App.2d 133, 245 N.E.2d 124 (1969); *Continental Insurance Co. v. Hancock*, 507 S.W.2d 146 (Ky.1973); *State v. Glens Falls Insurance Co.*, 137 Vt. 313, 404 A.2d 101 (1979); *Hensley v. Erie Insurance Co.*, 283 S.E.2d 227 (W.Va.1981). Several courts, however, have centered on the obligation to pay "damages because of bodily injury." Because punitive damages are not awarded as compensation for bodily injury, these courts have held that this contract provision does not make an insurance company liable to pay a punitive damage award against its insured. *Braley v. Berkshire Mutual Insurance Co.*, 440 A.2d 359 (Me.1982); *Schnuck Markets, Inc. v. Transamerica Insurance Co.*, 652 S.W.2d 206 (Mo.Ct.App.1983); *Nationwide Mutual Insurance Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, *cert. denied*, 293 N.C. 589, 279 S.E.2d 263 (1977).

In my opinion these latter cases are correct. There are great differences between punitive damages and damages awarded because of bodily injury. Punitive damages are awarded for the protection of society and to deter similar misconduct. They are not compensation for injuries, but, rather, punishment. Punitive damages are, therefore, separate and apart from and in addition to actual damages and are measured by the extent of the actor's malice. Damages because of bodily injury, on the other hand, are designed to compensate the victim for the injury suffered. Therefore, they cover only awards of actual or compensatory damages.

I do not believe that the instant insurance policy covers punitive damages or that

Aetna is obligated to pay the award against Wackenhut.

In his concurring opinion to *U.S. Concrete* Justice Ehrlich states that, in order to find an employer vicariously liable for an act of its employee, *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981), requires that some fault on the employer's part be found. The jury in the instant case, because of the instructions given here, must have found some fault on Wackenhut's part. In assessing punitive damages against Wackenhut the jury sought to punish it for its misdeeds. If insurance pays this award, Wackenhut is not being punished. A finding that this insurance policy provided coverage for punitive damages thwarts the jury's reason for imposing them. I would quash the holding of the district court in this case.

OVERTON, J., concurs.

Terrell M. JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

No. 59811.

Supreme Court of Florida.

Nov. 22, 1983.

Rehearing Denied Jan. 13, 1984.

Defendant was convicted in the Circuit Court, Orange County, Rom W. Powell, J., of first-degree murder and sentenced to death, and he appealed. The Supreme Court held that: (1) remand for new trial due to reconstruction of record was not required; (2) admission of testimony by police officer about results of experiments he conducted with murder weapon was not error; (3) exclusion for cause of prospective jurors was proper; (4) defendant waived his right under Interstate Agreement on Detainers to be brought to trial within 120 days after entering custody of State of Florida; (5) evidence was sufficient to support findings of statutory aggravating factors; and (6) instruction to jury, as to statutory aggravating factor, that felonies of attempted robbery and attempted murder of which defendant had been convicted were as matter of law felonies involving use or threat of violence was not erroneous.

Affirmed.

Shaw, J., dissented and filed opinion.

1. Criminal Law ⇐1181

Notwithstanding inconsistencies and omissions between original and corrected transcripts of trial, and time elapsed between trial and reconstruction of record of trial, remand for new trial was not required in prosecution for first-degree murder, in that defendant was unable to point to any omission, inconsistency, or inaccuracy which prejudiced presentation of his case, and, at evidentiary hearing on accuracy of reconstructed transcript, trial judge, court reporter, and both trial attorneys testified to substantial accuracy and completeness of reconstructed record in all material regards. West's F.S.A. RCrP Rule 9.200(f).

2. Criminal Law ⇐388

Issue as to results of experiments conducted with murder weapon is one of weight to be given evidence rather than its relevance or materiality.

3. Criminal Law ⇐388

Admission of testimony by police officer about results of experiments he conducted with murder weapon was not error; receding from *McClendon v. State*, 90 Fla. 272, 105 So. 406.

4. Jury ⇐106

Even though neither of two venire women stated on record that she would automatically vote against imposition of capital punishment, totality of their testi-

IN THE SUPREME COURT OF FLORIDA

LARRY JOE JOHNSON, SR.

Appellant,

-vs- CASE NO: 58,713

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

COMES NOW the Appellant, LARRY JOE JOHNSON, SR., by and through his undersigned counsel, and respectfully requests this Honorable Court to consider and grant a rehearing of this cause as provided by Rule 9.330(a) of the Florida Rules of Appellate Procedure, and in support thereof would submit the following:

(1) On November 17, 1983, this Honorable Court, in a 4-2 decision, affirmed Appellant's convictions for first degree murder and armed robbery, and his respective sentences of death and life imprisonment.

(2) The majority of this Honorable Court overlooked and/or misapprehended the true weight of the aggravating and mitigating circumstances brought out at the sentencing phase which resulted in the recommendations of death.

(3) The majority of this Honorable Court misapprehended the true unfavorable impact against Appellant of the actions of the Sheriff which more than likely did subject the Jury to the views of the State and severly impacted on the decision of recommending death.

(4) This Honorable Court should again consider the actions and decisions of the trial Judge related to the Appellant's mental or emotional disorder and impaired capacity to conform to the law,

as insufficient weight was given to the same at all levels of these proceedings.

WHEREFORE, due to the foregoing and the sensitive implications of meting a death sentence to any human being, Appellant again respectfully requests that a rehearing be granted.

Respectfully Submitted,

CLIFFORD L. DAVIS
1105 Hays Street
Tallahassee, Florida 32301
(904) 224-8429

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Mail to Mr. Jim Smith, Attorney General, The Capitol, Tallahassee, Florida this 2 day of December, 1983.

CLIFFORD L. DAVIS

Supreme Court of Florida

MONDAY, JANUARY 16, 1984

LARRY JOE JOHNSON, SR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 58,713

Circuit Court No. 79-33CF
(Madison)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

Deputy Clerk

TC
cc: Hon. Alford F. Welch, Clerk
Hon. L. Arthur Lawrence, Jr.,
Chief Judge

Clifford L. Davis, Esquire
P. Douglas Brinkmeyer, Esquire
Gregory C. Smith, Esquire

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 256, ch. 19684, 1939; CGL 1940 Supp. 8083(364); s. 121, ch. 79-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 256, ch. 19684, 1939; CGL 1940 Supp. 8083(367); s. 122, ch. 79-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 27, ch. 19554, 1939; CGL 1940 Supp. 9663.369; s. 119, ch. 70-339; s. 1, ch. 74-72; s. 9, ch. 75-724; s. 1, ch. 76-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 74-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 28(h), ch. 19554, 1939; CGL 8438, 8457; CGL 1940 Supp. 8663.37(h); s. 122, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In

IN THE SUPREME COURT OF THE UNITED STATES

83-6456

ORIGINAL

LARRY JOE JOHNSON, SR.,

Petitioner,

vs.

STATE OF FLORIDA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, LARRY JOE JOHNSON, SR., asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been declared insolvent in proceedings held in this case in trial and appellate courts of the State of Florida. Petitioner's affidavit in support of this motion is attached hereto.

AFFIDAVIT

I, LARRY JOE JOHNSON, SR., being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? no

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1975 $700.00 a month take home

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? no

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? no

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

none

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Larry Joe Johnson Sr.
LARRY JOE JOHNSON, SR.

Subscribed and Sworn to Before me this 15 day of March, 19 84.

J W Warren

My Commission Expires:

N[illegible] Oct. 4, 1985